

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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JEOFFREY L. BURTCH, CHAPTER 7	:	
TRUSTEE, FACTORY 2-U STORES, INC., <i>et</i>	:	
<i>al.</i> ,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	Civil action No. 1:07-cv-00556-***-LPS
MILBERG FACTORS, INC., CAPITAL	:	
FACTORS, INC., THE CIT	:	
GROUP/COMMERCIAL SERVICES, INC.,	:	
GMAC COMMERCIAL FINANCE LLC,	:	
HSBC BUSINESS CREDIT (USA) INC.,	:	
ROSENTHAL AND ROSENTHAL, INC.,	:	
STERLING FACTORS CORPORATION,	:	
WELL FARGO CENTURY INC.,	:	
	:	
Defendants.	:	
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REPLY IN SUPPORT OF DEFENDANT HSBC BUSINESS CREDIT (USA) INC.'S MOTION TO DISMISS AND JOINDER IN REPLY PAPERS FILED BY (I) CIT GROUP/COMMERCIAL SERVICES, INC. AND (II) GMAC COMMERCIAL FINANCE LLC, STERLING FACTORS CORPORATION, AND WELLS FARGO CENTURY, INC.

Defendant HSBC Business Credit (USA) Inc. ("HSBC") respectfully submits this Reply and joins in the reply briefs submitted by (i) The CIT Group/Commercial Services, Inc. and (ii) GMAC Commercial Finance LLC, Sterling Factors Corporation, and Wells Fargo Century, Inc. in further support of their motions to dismiss the Complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

In its earlier submission to the Court, HSBC joined in the other defendants' moving briefs and argued in addition that the Trustee's specific allegations concerning HSBC's actions *contradicted* his conclusory allegations that HSBC acted in parallel with the other defendants. *See* Motion to Dismiss and Joinder of Defendant HSBC Business Credit (USA) Inc. in Motions

to Dismiss Filed by (I) CIT Group/Commercial Services, Inc. and (II) GMAC Commercial Finance LLC, Sterling Factors Corporation, and Wells Fargo Century, Inc. In its Consolidated Brief in Opposition (“Opp.”), the Trustee fails to even acknowledge HSBC’s argument, let alone address it. Indeed, there is only one specific mention of HSBC in the Trustee’s answering papers, and that occurs when the Trustee quotes from the Complaint. (Opp. 16, *quoting* Compl. ¶ 35 (g)).

After *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929, 940 (2007), it is clear that the mere allegation of parallel conduct – such as declining to extend credit at about the same time – does not suffice to allege the existence of an agreement to conspire. But here, the allegations in the Complaint contradict the Trustee’s general assertions that HSBC acted in parallel with the other defendants. Thus, the Plaintiff’s bald assertions that “the defendants shared information” and “utilized the information they exchanged by agreeing to cut off or severely limit Factory 2-U’s credit at approximately the same time” have no conceivable vitality as to HSBC, which allegedly stopped extending credit to Factory 2-U before March 13, 2003. (Opp. 13; Compl. ¶ 35(l)).

The Trustee’s explanation of why the conspiracy was economically rational also has no validity to HSBC. Since HSBC stopped extending credit to Factory 2-U before other factors, HSBC, by definition, engaged in the individual “price/cost trade-off[]” that the price-fixing conspiracy was intended to avoid. (Opp. 26). Finally, even assuming that the defendants conspired to bankrupt Factory 2-U to better enable them to proceed against guarantors, the Complaint contains no allegation of any guarantor from whom HSBC could have sought recovery. (Opp. 27-28).

CONCLUSION

For the reasons stated herein, those stated in its Motion to Dismiss and Joinder, as well as those put forth the Motions to Dismiss of The CIT Group/Commercial Services, Inc., GMAC Commercial Finance LLC, Sterling Factors Corporation, and Wells Fargo Century, Inc., and the briefs filed in support and further support of them, HSBC respectfully requests that the Complaint be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

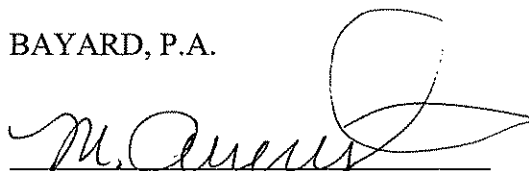
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Dated: April 2, 2008

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CERTIFICATE OF SERVICE

I, Mary E. Augustine, hereby certify that on April 2, 2008, I caused a copy of the **Reply in Support of Defendant HSBC Business Credit (USA) Inc.'s Motion to Dismiss and Joinder in Reply Papers Filed by (i) CIT Group/Commercial Services, Inc. and (ii) GMAC Commercial Finance LLC, Sterling Factors Corporation, and Wells Fargo Century, Inc.** to be served upon the following parties:

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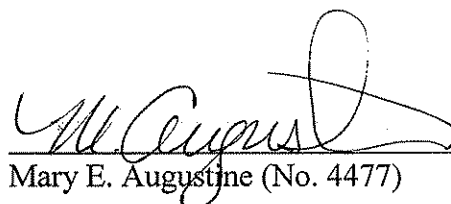
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